No. 1948

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

BETHLEHEM STEEL CORPORATION et al.,

Petitioners,

v.

LEONA P. BOILEAU et al.,

Respondents.

BRIEF OF RESPONDENT LEONA P. BOILEAU IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Counterstatement of Questions Presented

1. Should this court redecide the law of Pennsylvania on the res judicata effect of denial of a petition to strike a judgment upon an independent action to enjoin enforcement of the judgment and for other relief?

2. Should this court apply Lugar v. Edmondson Oil Co. to this case in light of the court of appeals decision that the district court should consider the matter in the first instance?

3. Should this court grant a writ of certiorari to petitioners who are in default for failure to serve an answer when reversal of the court of appeals would require decision of a remaining issue which the court of appeals did not reach?

Statement of the Case

Petitioner Bethlehem Steel Corporation ("Bethlehem Steel") sued plaintiff-respondent, Leona P. Boileau, in the Court of Common Pleas of Bucks County, Pennsylvania, on January 18, 1972. Blank, Rome, Klaus & Comisky ("Blank, Rome") represented Bethlehem Steel.

Bethlehem Steel alleged that Mrs. Boileau conspired with her husband, Henry L. Boileau, a Bethlehem Steel manager, in embezzling funds from Bethlehem Steel through a fraudulent invoice scheme. Bethlehem Steel showed ambivalence toward including Mrs. Boileau. It named her as an afterthought, then dropped her from the litigation, and added her once again about one month before the litigation

ended.

Mrs. Boileau was a housewife, who raised two children, and was not employed by Bethlehem Steel. She separated from her husband at the outset of the litigation and moved to Rhode Island. She denies service of process upon her (a sheriff's return of service notwithstanding).

Mr. Boileau maintained that Bethlehem Steel authorized his activities, that money generated by the scheme was used for bribery by Bethlehem Steel, and that the action against him was a sham to divert scrutiny from Bethlehem Steel's guilt.

Mrs. Boileau was not represented in the proceedings, but on June 21, 1972, Bethlehem Steel, her husband and their attorneys purported to settle the case

by agreeing to $797,404 in damages and transfer of the property of the Boileaus to Bethlehem Steel. Her husband's attorney purported to act on her behalf also.

A state judge entered "consent" judgments on the say-so of the attorneys. When Mrs. Boileau learned what had happened, she refused to sign releases and deeds contemplated by the settling parties. The husband's lawyer told Bethlehem Steel and the state court judge of Mrs. Boileau's repudiation of the settlement and her disavowal of representation by her husband's lawyer no later than July 17, 1972.

Undetered by the lack of foundation for the judgments, Bethlehem Steel and the state judge transferred Mrs. Boileau's property to Bethlehem Steel on August 14, 1972. The judge ordered the

sheriff to sign deeds for Mrs. Boileau. Bethlehem Steel later sold it at auction. Mrs. Boileau denies receiving notice of the post-judgment execution proceeding (petitioners' assertions to the contrary, no one could be found who claimed to have given her notice).

Mrs. Boileau was unable for a number of years to find counsel to champion her cause.

On June 20, 1978, within the six year Pennsylvania general statute of limitations then in effect, Mrs. Boileau filed a diversity action in the United States District Court for the Eastern District of Pennsylvania, seeking an injunction against further enforcement of the judgments, restitution of her property and damages. Such action was authorized under Pennsylvania practice by Sherwood Bros. Co. v. Kennedy, 132

Pa. Super. 154, 200 A.689 (1938) and under federal diversity practice by Marshall v. Holmes, 141 US 589 (1891) and Huddleston v. Ohio River Co., 328 F.2d 789, 791 (3rd Cir. 1964). Bethlehem Steel and Blank, Rome moved to dismiss or to stay the diversity action.

On October 16, 1978, the district court denied the motion to dismiss but stayed proceedings on her case pending a petition to strike the judgments in Bucks County.

The petition to strike was summarily denied by the state judge on June 6, 1979, and his ruling was affirmed by the Superior Court of Pennsylvania on June 12, 1981. Bethlehem Steel v. Tri State Industries, Inc., 290 Pa. Super 461, 434 A.2d 1236 (1981). (A-54-67 (Appendix to Petition)). The Supreme Court of Pennsylvania denied further appeal on

November 30, 1981.

On July 24, 1980, Bethlehem Steel pleaded guilty to a lengthy history of corporate corrupt practices similar to those alleged by Mr. Boileau years before. United States v. Bethlehem Steel Corporation, S.D.N.Y. 80 Crim. 431.

Mrs. Boileau had no hearing in the state courts, and the Superior Court denied relief on the ground that her petition was not filed within a reasonable time.

Returning to the district court, Mrs. Boileau moved to amend her complaint to plead violation of 42 U.S.C., Section 1983, and to drop the grantees from Bethlehem Steel as defendants (thereby electing damages over return of her property). The law in the jurisdiction

changed when Dennis v. Sparks, 449 U.S. 24 (1980), overruled Meyer v. Curran, 397 F. Supp. 512 (E.D. Pa. 1975), permitting damages actions against private parties who join with state judges in violating civil rights.

On March 5, 1982, Bethlehem Steel and Blank, Rome moved for summary judgment, but they neglected to file an answer.

On March 14, 1983, the district court gave preclusive effect to the actions of the state courts of Pennsylvania in denying Mrs. Boileau's petition to strike judgments (A-30-34), and granted defendants summary judgment.

On March 28, 1984, the United States Court of Appeals for the Third Circuit reversed the district court, holding (1) that under Pennsylvania law, the denial of a petition to strike judgments was

not res judicata of an independent action to enjoin enforcement of judgments and for damages, and (2) that the district court abused its discretion in denying leave to amend the complaint to add Section 1983. Boileau v. Bethlehem Steel Corp., 730 F.2d 929 (3rd Cir. 1984) (A-1-14).

While the appeal was pending, plaintiff learned that Blank, Rome had contributed to the campaigns of at least four jurists in the state courts who sat on Mrs. Boileau's case, including one Pennsylvania Supreme Court Justice who was running for retention and sitting on the case at the time of the campaign contribution. Blank, Rome also contributed to the campaign of the Superior Court judge who wrote the last opinion in the case.

Mrs. Boileau filed a Rule 60(b) motion

in the district court on October 20, 1983, before the argument of her appeal. She asked the appellate court to take notice of the 60(b) motion in deliberating upon the effect to be given to the state court proceedings.

The court of appeals declined to rule on the judicial campaign contribution issue on the grounds that it was unnecessary to do so in light of Mrs. Boileau's success on the original issues in the appeal and because the issue arose pending appeal (A-16-18, A-23-24).

Argument

1. This court should not redecide the law of Pennsylvania on res judicata.

Petitioners intimate that the court of appeals deviated from established practice to provide a federal forum for fact finding with respect to issues of state law. This is erroneous. The court of appeals followed the principle that a federal court sitting in diversity must apply the law of the state in which it sits.

Three judges from Pennsylvania held that Bowman v. Berkey, 259 Pa. 327, 103 A.49 (1918), controlled and that under Pennsylvania law the denial of a petition to strike a judgment was not res judicata with respect to a subsequent action to enjoin enforcement and for damages.

Even if there were doubt on the question, it would be inappropriate for this court to devote its resources to redeciding a question of Pennsylvania law.

Bowman is consistant with other states and federal courts concerning relief from judgments. Compare Griffith v. Bank of New York, 147 F.2d 899 (2d Cir. 1945) and Rule 60(b), F.R. Civ. P.

The application of Bowman to the facts of this case is correct since the petition to strike was decided without regard to evidence outside the original record upon which the judgments were entered. Mrs. Boileau was unable to have considered her evidence that her husband's attorney did not represent her and that she was not served with process. She was bound by the attorney's unauthorized entry of

appearance and an erroneous sheriff's return.

Mrs. Boileau was denied consideration on a technicality relating to petitions to strike, which have no application to independent actions raising issues of fact outside the original record.

The Superior Court denied the petition to strike as untimely in part because of the effect on third parties such as grantees from Bethlehem Steel (A-66).

Standard Pennsylvania Practice, Chapter 30, Section 7, says:

> "The remedy afforded by the proceeding in equity to obtain relief from a judgment operates, not upon the judgment itself, but the parties only, and the decree in such suit operates in personam upon the judgment creditor, who may be punished for contempt of court consisting of violation of the decree. Equitable relief may be obtained in the proper case by means of an injunction. Courts of equitable jurisdiction may, under proper circumstances, as an

incident to relief against a judgment, compel reconveyance or grant an account."

Marshall v. Holmes, supra, 141 US at 599, described a diversity action of the present type:

> "While it (the federal court) cannot require the state court itself to set aside or vacate the judgments in question, it may, between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect will operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in the state court. It would simply take from him the benefit of judgments obtained by fraud."

2. This court should decline an invitation to apply Lugar v. Edmondson Oil Co. to this case in the absence of lower court determinations.

Petitioners ask the court to decide the application of Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), to this case. The district court did not decide

the question and the court of appeals expressly declined to preempt the district court on the proper application of Lugar because of lack of clarity of the record and the principle that the district court should decide issues in the first instance (A-19 (note 10)).

It would be inappropriate for this court to take up an issue before the district court or the court of appeals.

3. Petitioners' default and the remaining judicial campaign contribution issue make review inappropriate.

Defendants never answered the complaint in the district court and are in default. A motion for summary judgment is not a responsive pleading or one of the motions which extends the time to answer under Rule 12, F.R. Civ. P. Poe v. Cristina Copper Mines, 15 F.R.D. 85, 87 (D. Del. 1953). Defendants had made a Rule 12 motion, which was

denied on October 16, 1978.

A default exists when no answer is timely filed even if such default is not formally entered on the docket. Orange Theatre Corp. v. Rayherstz Amusement Corp., 130 F.2d 185, 187 (3rd Cir. 1942).

Defendants in default have no right to raise defenses, much less affirmative defenses such as res judicata or collateral estoppel. A party in default has lost his standing in court, cannot appear in any way, cannot adduce any evidence, and cannot be heard at final hearing, excepting as to amount of damages. Clifton v. Tomb, 21 F.2d 893, 897 (4th Cir. 1927). A fortiori, a party in default is not entitled to a writ of certiorari to review the merits of his defenses.

Defendants never disclosed to Mrs. Boileau, her counsel, or the district court that Blank, Rome was freely making campaign contributions to state judges who sat on Mrs. Boileau's case.

Assuming this court were to reverse on the original res judicata issue, the effect of Blank, Rome's campaign contributions would remain an issue in the action.

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Certificate of Service

The undersigned counsel hereby certifies that he served three copies of the foregoing brief upon other counsel of record on July 20, 1984, by first class mail.

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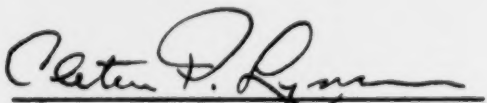

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